21

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 493

MARTIN DUANE McGUIRE,

Petitioner,

vs.

STATE OF MARYLAND

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND BRIEF IN SUPPORT THEREOF

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INDEX

Subject Index

	PAGE
Petition for Writ of Certiorari	1-7
Summary and statement of matter involved	2-5
Questions presented	5-6
Reasons relied on for granting writ	6-7
Prayers for writ	7
Brief in Support of Petition	9-19
Statement of the case	9
Specifications of error	9-10
Constitutional Provisions and Statutes Involved	10-11
Argument	12-17
Conclusion	17-19

Table of Authorities Cited

Cases

Brown v. Mississippi, 297 U. S. 278	16
Ex parte Milligan, 4 Wall. 2	19
Johnson v. United States, 333 U. S. 10	13
McDonald v. United States, 335 U. S. 451	13, 14
Nardone v. United States, 302 U. S. 379	12
People v. Gitlow, 234 N. Y. Reports 132	18
Rochin v. California, 342 U. S. 165	16
Upshaw v. United States, 335 U. S. 410	15
United States v. Jeffers, 342 U. S. 48	15
Weiss v. United States, 308 U. S. 321	12
Williams v. United States, 341 U. S. 97	17

Constitutional Provisions and Statutes

Constitution of the United States, Amendment IV 7, 10, 11
Constitution of the United States, Amendment V 7, 10, 11
Constitution of the United States, Amendment XIV 7, 10
The Federal Communications Act of 1934, (47 U. S. C. Secs. 501 and 605) 6, 9, 11, 12, 14
Section 20 of the Criminal Code (now 18 U. S. C. Sec. 242) 17

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STATE OF MARYLAND

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

To the Honorable, Fred M. Vinson, Chief Justice of the United States, and the Honorable, the Associate Justices of the Supreme Court of the United States:

Your petitioner, Martin Duane McGuire, respectfully shows and represents unto your Honors and prays that a writ of certiorari be issued to review the judgment of the Court of Appeals of Maryland, entered in the above entitled cause on, to wit: the 11th day of November 1952 (App. p. 231).

I.

SUMMARY AND STATEMENT OF MATTERS INVOLVED

The following statement of facts and questions involved here are taken from the record of the trial in the Criminal Court of Baltimore City and the proceedings in the Court of Appeals of Maryland.

The proceedings in this case began in the Criminal Court of Baltimore City by the State of Maryland on June 22, 1951 filing a presentment charging Hess, Silverman, Manger, Groh, Morgan, Standly and Major with conspiracy (App. p. 1). Then on June 25, 1951 Sody, Betty Benninghove and Basil L. Benninghove had a presentment filed in the same case charging them with the same conspiracy (App. p. 2). Basil had been furnished by all those charged (App. pp. 1, 2) and at that time Martin Duane McGuire, the petitioner here was neither heard of or known to the prosecuting authorities.

Two Baltimore police left the State of Maryland and arrived in the District of Columbia after noon of June 25, 1951.

On June 26, 1951 presentment was filed against McQuire charging him with conspiracy and the same day the indictment was filed against all those previously charged and including McGuire (App. pp. 2, 4-5).

Motions to dismiss and other proceedings as to McGuire were had and then on December 4, 1951 all of those indicted except McGuire and Hess were arraigned and pleas entered (App. p. 3). Then on December 12, 1951 a Nolle Prosequi was entered by the State as to Sody, Basil L. Benninghove, Betty Benninghove, Silverman, Manger, Groh,

Morgan, Standly and Major, leaving the indictment standing against McGuire and Hess only (App. p. 3).

The next day, December 13, 1951, McGuire and Hess were arraigned, pleaded "not guilty" were tried before the Court, Sherbow J. and a jury and on the following day a verdict of "guilty", as to each, was entered on the 2nd count (App. p. 3) and thereafter judgment from which an appeal was entered to the Court of Appeals of Maryland, where the judgment was affirmed.

Morton J. Hess had a candy store at 1402 W. Baltimore Street (Baltimore City) and lived over the store with his family, and there was a telephone there Gilmor 0914. Martin Duane McGuire, lives with his wife and children at 432 Lincoln Avenue, Tokoma Park, Maryland.

Ralph H. Amrein, formerly a Lieutenant of the Headquarters Division (State of Maryland, located in Baltimore City) who had been dismissed from the force by Police Commissioner Ober (App. 142-3) was the first witness called by the State.

He, Officer Isidore Glass and Sgt. William Pence, described how they had tapped the telephone wire of Gilmor 0914 located in the premises 1402 West Baltimore Street, Baltimore City, Maryland on June 9, 1951, and then rented a room in an adjoining dwelling and carried a wire into that room, hooked up a monitor and then intercepted the conversations, without first obtaining permission from anyone until June 13, 1951 (App. pp. 48-54, 175-181, 204-206) and then were permitted to read into the testimony a transcript of the intercepted *interstate* communication between Gilmor 0914 and Randolph 4037, located in Apt. 424 Crestwood, Washington, D. C. (App. pp. 55-59, 181-182), although it was, so the witnesses stated impossible to produce in court

and play the tape on the monitor (App. pp. 205-207) all over the objection of McGuire and his co-defendant, Hess (App. pp. 42, 43, 44).

Further, the then Lt. Amrein and Officer Glass on June 25, 1951, after noon, left Baltimore, Maryland, went over to the District of Columbia, called on the Washington police and with two officers of the District Police, went to the Crestwood Apartments (3900 Sixteenth Street, N. W., Washington, D. C.) and without warrant, search or otherwise, attempted to enter Apt. 430 by rapping and kicking on the door, and being unsuccessful (App. p. 68) and then Lt. Amrein sent Officer Glass downstairs for the lady who managed the apartment house (a Mrs. Florence McDowell) who opened the door for the officers (Baltimore and Washington) and they entered and found McGuire therein. The officers showed him their credentials (App. p. 105) and proceeded to search his person (App. p. 123).

Both the Baltimore and the Washington police were armed, carrying pistols, visible (App. pp. 116, 120, 126), the then Lt. Amrein turned to the table in the room and saw lottery paraphernalia (App. p. 69) which was afterwards gathered up by him (Amrein) and Officer Glass and taken to Baltimore where McGuire was also taken (App. p. 105).

After some conversation, all of which was objected to, the Baltimore police told McGuire he could either come to Baltimore with them or go with the Washington police (App. pp. 22, 110) and McGuire testified that he was arrested, the paraphernalia seized, and he was told by the Baltimore police he could either go with them to Baltimore or be held by the Washington police for burglary or robbery (App. p. 123).

McGuire stated that he was told (App. p. 124):

"* * * It would be better if I would go to Baltimore."

The threat was (App. p. 123):

"* * * Lieutenant Amrein asked me whether I would go to Baltimore with them or whether I would go with the Washington police, and that if I went with the Washington police they could hold me for robbery or burglary. * * *"

The inducement or promise was (App. p. 128):

"A. Yes, that is all that would be necessary, if I would go to Baltimore and make a statement they would release me; and if I went to Washington I would be held for burglary or robbery."

The statement, admission or conversation under the above promise of release, coupled with a threat if not complied with produced the result the Baltimore police with the efforts and assistance of the Washington police, desired, and over the objection of the petitioner, McGuire, the statements and paraphernalia were admitted into evidence, even though the Baltimore police admitted they knew (App. p. 115):

"A. We had no jurisdiction to hold him on anything there."

II.

QUESTIONS PRESENTED

The petitioner, Martin Duane McGuire, by motions to dismiss filed (1) on June 28, 1951 (App. pp. 6-9), (2) on September 24, 1951, answer of State and exhibits (letter and paper called "admissions") on September 28, 1951 and reply to said answer, on October 3, 1951 (App. pp. 11-22), Motion in writing at conclusion of testimony (App. pp. 210-213) and verbal motions (App. pp. 215-216), contended

in the trial court, the Criminal Court of Baltimore City, and in the Court of Appeals of Maryland, that the petitioner was deprived of a fair and impartial trial, denied due process of law, denied the equal protection of the law, subjected to unreasonable searches and seizures, and compelled to be a witness against himself in a criminal proceeding:

(a) By admitting, without the permission of the sender, Baltimore police officers to testify that they had, by wire tapping, intercepted an interstate telephone communication, and divulging the same in a criminal proceeding in violation of the Federal Communications Act of 1934 (47 U. S. C. Sec. 605).

(b) By refusing to suppress and exclude the "lottery" paraphernalia seized in Apt. 430, Crestwood Apartments, Washington, District of Columbia.

(c) By refusing to exclude from the testimony the confession, statement or admission made by the petitioner while under arrest, with promise of release if made, and threat of, otherwise, being charged with serious felony.

III.

REASONS RELIED ON FOR GRANTING WRIT

(a) That the Court of Appeals of Maryland has decided a Federal question involving the construction and application of the Federal Communications Act of 1934 (47 U. S. C. Sec. 605) in conflict with the applicable decisions of this Court.

(b) That the Court of Appeals of Maryland has decided Federal questions raised by the petitioner in the trial court and the Court of Appeals denying due

process of law to a citizen of the State of Maryland by convicting, and affirming the conviction, of petitioner of a crime in violation of the 14th Amendment of the Constitution of the United States.

(c) That the Court of Appeals of Maryland has decided a Federal question involving the construction and application of the Constitution of the United States, Amendments IV, V and XIV, with respect to the rights, privileges and immunities of a citizen of the United States while in the District of Columbia subject to the jurisdiction of and under the protection of the Federal Courts, all in conflict with the applicable decisions of this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of Maryland commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of the proceedings in cases numbered and entitled on its docket for the October Term 1952, No. 7 Martin Duane McGuire, appellant v. State of Maryland, and that said judgment of the Court of Appeals of Maryland may be reversed by this Honorable Court, and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem equitable, just and proper.

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Counsel for Petitioner.

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STATE OF MARYLAND

BRIEF IN SUPPORT OF PETITION

I.

STATEMENT OF THE CASE

The statement of the case in the foregoing petition is, it is respectfully suggested, sufficient for the purposes of this brief and is hereby referred to and incorporated herein by reference.

II.

SPECIFICATIONS OF ERROR

(a) The Court of Appeals of Maryland erred in determining or refusing to determine that the Federal Communications Act of 1934 (47 U. S. C. Sec. 605) prohibits every person not being authorized by the sender to intercept any

communication and divulge or publish the same transmitted by wire, etc. (App. p. 229).

(b) The Court of Appeals of Maryland erred in admitting in evidence and refusing to suppress and exclude from the testimony offered at the trial the "lottery" paraphernalia seized in the City of Washington and District of Columbia, without warrant, at Apartment 430, Crestwood, and transported to Maryland, Baltimore City, by refusing to consider, denying or ignoring the rights, privileges and immunities of a citizen of the United States guaranteed under the Constitution of the United States Amendments IV, V, and XIV.

(c) The Court of Appeals of Maryland erred in admitting in evidence and refusing to exclude from the testimony the confession, statements or admissions of Martin Duane McGuire obtained by force, threats and promises, thus refusing to consider, denying or ignoring the rights, privileges and immunities of a citizen of the United States guaranteed under the Constitution of the United States Amendments IV, V, and XIV.

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV:

> "Sec. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private properly be taken for public use, without just compensation."

Federal Communications Act of 1934 47 U. S. C. Sec. 605:

"No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent or attorney * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; * * *"

IV.

ARGUMENT

A.

THE FEDERAL COMMUNICATIONS ACT OF 1934 (47 U. S. C. SEC. 605) PROHIBITS THE INTERCEPTING AND DIVULGING OF INTERSTATE TELEPHONE CONVERSATIONS.

The Court of Appeals of Maryland heretofore has determined that evidence obtained as a result of information gained by wire tapping is admissible in the trial of a criminal case and of course this rule is universal and not here questioned but in the instant case the Court of Appeals of Maryland referring to Weiss v. U. S., 308 U. S. 321, 329, states that the Federal Communications Act as construed by this Court applies to both interstate and intrastate communications and satisfied the refusal to give effect to said Act by stating (App. p. 229):

> "In the absence of a decision of the Supreme Court to the contrary, we adhere to the view that the evidence obtained by wire tapping in the instant case was admissible."

This Court in construing the Act said:

> "We nevertheless face the fact that the plain words of §605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message or its substance to 'any person'. To recite the contents of the message in testimony before a court is to divulge the message * * *".
>
> Nardone v. United States, 302 U. S. 379 at 383.

B.

UNDER THE LAW APPLICABLE TO THE DISTRICT OF COLUMBIA, SUBJECT TO THE JURISDICTION AND UNDER THE PROTECTION OF THE FEDERAL COURTS, UNREASONABLE SEARCHES AND SEIZURES WITHOUT WARRANT ARE PROHIBITED.

Martin Duane McGuire, the petitioner, was, so the State contends, an employee of Rosenthal who had, as agent for Senator Madragal, rented apartments 424, 426, 429 and 430 in The Crestwood located at 3900 Sixteenth Street N. W. Washington, D. C., who, Rosenthal, had moved in after Mrs. McDowell the rental agent had accepted his application (App. pp. 166, 167). McGuire was in the apartment as above when the Baltimore police and the Washington police under the circumstances hereinbefore referred to obtained an entrance to Apartment 430. There had been ample time from June 11, 1951 or June 13, 1951 to June 25, 1951 to apply to one of the Federal Courts having jurisdiction and situated in the District of Columbia for a search warrant. There was no visible crime being committed in the presence of the Baltimore police who seized the "lottery" paraphernalia.

The Baltimore police searched the person of McGuire, seized what they saw on the table, and carried it to Baltimore where afterwards it was admitted over the objection of the petitioner into evidence.

> "Where, as here, officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances, as we held in Johnson v. United States, 333 U. S. 10 * * *".
>
> McDonald v. United States, 335 U. S. 451 at 454.

The day the search was made on June 25, 1951. The wire taps by the Baltimore Police were completed on June 13,

1951. On the basis of the wire taps, on June 15 1951, search warrants were obtained in Baltimore City an Hess' home was entered where no incriminating evidenc was found. There was ample time from June 13, 1951 w en the wire tapping was discontinued until June 25, 1951 o apply for and obtain a search warrant in the District o Columbia, but there were great and cogent reasons wh the police would not so apply, the deterrant was the pro ibition and penalty provided in the Federal Communica ons Act of 1934 (47 U. S. C. Secs. 605, 501).

The State claims, and cannot be here heard to controvert, despite the opinion of the Court of Appeals, th Rosenthal had actually signed the lease for Apt. 430 in the Crestwood (App. p. 166) that Mrs. McDowell, the nanager of the apartment building had met Rosenthal befo e he moved in (App. p. 167), and the police testified that McGuire was an employee of Rosenthal (App. p. 194), an McGuire, being rightfully there, was entitled to the s me rights, privileges and safe guards to which Rosenthal was entitled, then the arrest, seizure of the paraphernalia, and the confessions, admissions and statements were inadmissible.

McDonald v. United States, 335 U. S. 451.

McGuire was arrested, detained, held or whatever you may call the proceedings of the Baltimore Police in conjunction and with the help of the Washington Police for the purpose and the purpose only of attempting to obtain confessions, statements or admissions that he was engaged in some unlawful and illegal enterprise. He was detained and questioned in Washington, District of Columbia, where the courts were open and available to the authorities, and he could, and should, if there was any charge or offense against him alleged, have been taken before a

Magistrate in the District, but that was the thing the Baltimore Police did not wish, for then and there his rights would have been preserved, he would have been charged with a crime, if any had been committed. The police officers' only desire was to hold McGuire and *"furnish the police officers with an opportunity for further interrogation"* what was done was illegal and any confession, admission or statements, such as were secured, were inadmissible at the trial.

Upshaw v. United States, 335 U. S. 410.

McGuire on June 25, 1952 when the two Baltimore police, acompanied by the two Washington, D. C. police, invaded Apt. 420 in the Crestwood, was in the District of Columbia, and both the Fourth and Fifth Amendments to the U. S. Constitution should be applicable within the jurisdiction and under the protection of the Federal Courts. There had been ample time and opportunity for either, or both, the Maryland police or the District police to apply for a search warrant.

> "* * * There was no question of violence, no movable vehicle was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized. * * * Rather they are bound together by one sole purpose — to locate and seize the narcotics of the respondent. * * *"
>
> United States v. Jeffers, 342 U. S. 48.

The sole purpose of the police, when they invaded the apartment was to secure evidence of the "conspiracy charge" presented by the Grand Jury of Baltimore City against those named in the presentments on and prior to June 25, 1951, wherein McGuire had neither been named nor included. The evidence (lottery paraphernalia) there seized was inadmissible and should have been suppressed.

C.

A CONFESSION OBTAINED BY THREATS AND PROMISES UNDER *THE DUE PROCESS CLAUSE* OF THE AMENDMENTS TO THE CONSTITUTION SHOULD NOT BE ADMITTED INTO EVIDENCE AGAINST THE PERSON ACCUSED AND STANDING TRIAL.

The confession, statements or admissions made by McGuire while in the custody of the officers with the promise that he would be released if he came to Baltimore and made a statement otherwise he would be held by the Washington police for burglary or robbery was obtained in violation of the constitutional privileges guaranteed to a citizen of the United States and under the concert and with the actions and performance of the Washington police authorities while in the District of Columbia was also an offense against the Federal Statutes prohibiting under State authorities officers of the State to obtain a confession thus abridging the rights, privileges and immunities of a citizen of the United States.

> "* * * Due process of law, as a historic and generative principle, precludes defining, and thereby confining, those standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' See Mr. Chief Justice Hughes, speaking for a unanimous Court in Brown v. Mississippi, 297 U. S. 278, 285, 286. * * * Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency * * *."
>
> Rochin v. California, 342 U. S. 165.

Whether a confession or admission to incriminate one is voluntary or not must be determined by the State of

mind of the accused at the time. It is as terrifying, if not more so, to threaten, than is the immediate use of force. The threat to be charged with "burglary" was as overpowering to the mind as a beating such as would exhaust the body to non-resistance.

In sustaining a conviction for obtaining confessions by force and violence in violation of the Federal Statute (18 U. S. C. §242) and the inadmissibilty of a confession so obtained, Mr. Justice Douglas speaking for this Court in Williams v. United States, 341 U. S. 97 at 101, said:

> "* * * It is as plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause. This is the classic use of force to make a man testify against himself. The result is as plain as if the 'rack, the wheel, and the thumb screw — the ancient methods of securing evidence by torture' (authorities cited) were used to compel the confession * * *".

V.

CONCLUSION

The conviction of Martin Duane McGuire on a charge of conspiracy to violate the Lottery Laws of Maryland resulted in a verdict of guilty and sentence and judgment of the Criminal Court of Baltimore City only because the wire tapped evidence, the lottery paraphernalia and the confession or admissions were admitted into evidence over the objection of the petitioner and which conviction and judgment were confirmed and sustained by the Court of Appeals of Maryland. The admission into evidence of the "lottery" paraphernalia seized in Washington, was certainly error and in violation of the Federal law and there

could have been no conviction unless this error was committed. The admission into evidence of the confession, statements or admissions of McGuire obtained by the promises and threats were error and in violation of the Federal law and the conviction could not have been had without the error thus committed. Likewise allowing the Baltimore Police Officers to testify in the Criminal Court of Baltimore City that they had tapped, listened to and divulged an *interstate* telephone communication was in violation of the Federal Statute — a direct change, a complete about face when the same police officers refused to testify in the suit against them by McGuire and others in the Federal Court at Baltimore on the grounds that they, the police officers so testifying would tend to incriminate them and that by the advice of the Attorney General of Maryland and his assistant at that trial.

What we are urging upon this Court is not to acquit the guilty by some technical rule of law, or allow an escape from justice because we are carried away by the advocacy for a client, it is rather to preserve the rights of all men under the law, a trial by law and not by men, as Judge Pound of New York so aptly said in People v. Gitlow, 234 N. Y. Reports, 132 at 138:

> "The rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."

The Baltimore Police were acting under State authority to search, seize and arrest the petitioner McGuire and take what he had on his person or in his possession in a foreign jurisdiction, (without warrant of arrest or of any other kind) for the purpose of prosecuting a misdemeanor in the Criminal Court of Baltimore City. Neither the Baltimore, Maryland, or District of Columbia police had any

right or authority to do what they did, seize McGuire, take his statement or confession and transport him and the other paraphernalia to Baltimore except under that spurious rule of conduct which Mr. Jeremiah S. Black is reported to have so successfully argued before this Court in Ex parte Milligan, 4 Wall. 2:

"The good old rule the simple plan
He takes who has the power, he keeps who can".

Respectfully submitted,

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22

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

Table of Contents

	PAGE
Statement of the Case	1
Questions Presented	3
Statement of the Facts	3
Argument:	
I. Did the Admission in Evidence, Without the Permission of the Sender, of the Substance of Telephone Conversations Obtained by Baltimore Police Officers by Means of Wiretapping Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?	10
II. Did the Admission in Evidence of the Lottery Paraphernalia Seized in an Apartment in Washington, District of Columbia, Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?	11
III. Did the Admission in Evidence of the Confessions, Statements or Admissions Made by Petitioner While in the Custody of the Police Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?	14
Conclusion	15

Table of Citations

Cases

	PAGE
Baum v. State, 163 Md. 153, 156-157	13
Bevans v. State, 180 Md. 443, 448	13
Bratburd v. State, ... Md. ...., 88 A. (2d) 446, 449 (cert. den., December 22, 1952, not yet reported)	11
Curreri v. State, ... Md. ...., 85 A. (2d) 454, 455	13
Delnegro v. State, ... Md. ...., 81 A. (2d) 241, 245	14
Frankel v. State, 178 Md. 553, 562	13
Hitzelberger v. State, 174 Md. 152, 165-169	11
Lambert v. State, ... Md. ...., 75 A. (2d) 327, 329-330	13
Leon, et al. v. State, 180 Md. 279, 283-285 (cert. den. 316 U. S. 680, 86 L. Ed. 1753)	11
McGuire v. State, ... Md. ...., 92 A. (2d) (Adv. Shts.) 584-585	12-13
Resnick v. State, 183 Md. 15, 18	13
Rochin v. California, 342 U. S. 165, 96 L. Ed. (Adv. Shts.) 154	14
Rowan v. State, 175 Md. 547, 559-560	11
Schwartz v. Texas, No. 41, Oct. Term, 1952, Supreme Court of the United States (not yet reported)	11, 12
Williams v. United States, 341 U. S. 97, 95 L. Ed. 774	14
Wolf v. Colorado, 338 U. S. 25, 93 L. Ed. 1782	12

Statutes

Constitution of the United States	11
Fourth Amendment	12
Federal Communications Act of 1934 (47 U. S. C. A., Section 605)	11

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STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to the Court of Appeals of Maryland. Petitioner, along with one Morton J. Hess and several other persons, was indicted by the

grand jury of Baltimore City under a charge of unlawful conspiracy to violate the laws of the State of Maryland relating to lottery. The conspiracy allegedly took place between June 10 and 15, 1951. Although the indictment contained three counts, Petitioner was tried on the second count only (5)*, the State having abandoned the first and third counts.

Petitioner filed a number of preliminary motions, including a motion to dismiss the indictment and each and every count thereof and a motion to suppress and exclude from evidence at the trial the content of certain telephone conversations (6-7, 11-14). Those motions were overruled by the Trial Court. The case was tried before the Honorable Joseph Sherbow, Associate Judge of the Supreme Bench of Baltimore City, and a jury. Upon the conclusion of the case, a motion was filed on behalf of Petitioner, in which he requested the Court to instruct the jury to render a verdict of not guilty (210-213). This motion was overruled by the Trial Court (214). The jury rendered a verdict of guilty under the second count (224).

Motion for a new trial was overruled by the Supreme Bench of Baltimore City and Petitioner was sentenced to serve eighteen months in the Maryland House of Correction and to pay a fine of $2,000 and court costs.

An appeal was taken from this judgment to the Court of Appeals of Maryland. The judgment was affirmed by unanimous decision of that Court in an opinion by Judge Henderson filed on November 11, 1952 (226-231), ... Md. ...., 92 A. (2d) 582.

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* References are to the Transcript of Record.

QUESTIONS PRESENTED

The Petitioner has submitted for the consideration of this Court three questions, which are substantially as follows:

I.

Did the Admission in Evidence, Without the Permission of the Sender, of the Substance of Telephone Conversations Obtained by Baltimore Police Officers by Means of Wiretapping Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

II.

Did the Admission in Evidence of the Lottery Paraphernalia Seized in an Apartment in Washington, District of Columbia, Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

III.

Did the Admission in Evidence of the Confessions, Statements or Admissions Made by Petitioner While in the Custody of the Police Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

STATEMENT OF THE FACTS

On Saturday, June 9, 1951, Lt. Ralph Amrein and Officer Isidore Glass of the Baltimore City Police Department made a wire tap on the telephone line leading into the premises 1402 West Baltimore Street (Gilmor 0914), listed in the name of Mrs. Myrtle Hess. Those premises are owned by Mr. Morton J. Hess, Appellant's co-defendant, who operated a confectionery and delicatessen in such premises (42, 171,

175). The officers proceeded to listen in on telephone conversations being made to and from that number. It was determined by the officers that they had tapped the correct telephone line (42, 176). Between the hours of 1.00 P. M. and 3.00 P. M., the two officers heard "Mr. Hess give out over the telephone to other people certain lottery numbers" (49, 177).

Having satisfied themselves that a lottery operation was being conducted by means of the tapped telephone, the officers proceeded to rent an apartment at No. 8 North Calhoun Street, Baltimore, Maryland (49, 177). A window in that apartment was located not more than fifty to sixty feet away from the box where the wire tap had been effected (177). Officer Glass proceeded to run a telephone wire out of the window of the apartment to the telephone pole where the wire tap had been effected and to make the necessary connection (49, 177).

At first, the officers merely monitored the telephone conversations overheard by them. However, after a short time, Sergeant William Pence installed in the apartment a recording machine on which all conversations were recorded on tape. Meanwhile, the officers continued to monitor the telephone conversations (49-50, 178-179) to and from Gilmor 0914. They were intercepted in that fashion on June 9, 10, 11, 12 and 13 (178-179, 185-186). The telephone calls which were monitored and recorded were intercepted on the last three days (185-186).

Officer Glass was able to identify positively the male voice which used the telephone, Gilmor 0914, in connection with the lottery operation as that of Mr. Morton J. Hess. He made this identification in two ways. First, on one occasion, such person identified himself by name and address in placing an order with a business house. Second, on June

13, after listening to the voice by means of wire tap, Officer Glass visited the store at 1402 West Baltimore Street and, under the guise of making purchases, talked with the proprietor, Mr. Morton J. Hess (178, 186-187).

A great number of the telephone conversations overheard by the police were concerned with lottery bets. Typical was a conversation on June 11, 1951, at 1.20 P. M., from Gilmor 0914 (Mr. Hess) to Randolph (Washington, D. C.) 4037 (Petitioner) (53, 54, 55, 56-59). Officer Glass identified Petitioner as the other party to that telephone conversation. That identification was based upon a comparison of the voice overheard at the time of the conversation with the voice of Petitioner at the time of the visit by the police from Baltimore and Washington to the Crestwood Apartments, Washington, D. C., on June 25, 1951 (192).

Beginning on the night of Wednesday, June 13, 1951 and working until about 7 A. M. on Friday, June 15, 1951, Lt. Amrein, Officer Glass, Sergeant William Pence and Mrs. Diven, a stenographer employed by the Police Department of Baltimore City, transcribed the recorded telephone conversations and checked the transcriptions to be certain of their accuracy (50-51, 183-185). Immediately thereafter, an application for a search and seizure warrant and the warrant were typed. The search and seizure warrant was issued by the Honorable Robert France, Associate Judge of the Supreme Bench of Baltimore City, on June 15, 1951. The warrant was directed to the premises 1402 West Baltimore Street and to one Morty Hess (89).

The officers executed the search and seizure warrant and found nothing as a result of their search (91-92). However, Mr. Hess did make certain admissions in discussing the matter with the officers. For example, after they ad-

vised Mr. Hess that they had tapped his telephone wires, they asked "Now that you believe — do you believe we know what is going on here?" He replied "You heard everything that went over the line, what do you want me to do, bury myself?" Also, after Officer Glass recited the six telephone numbers regularly called by Mr. Hess in connection with the lottery operation, Mr. Hess said: "He knows the numbers better than I do" (188, 92).

On June 25, 1951, Lt. Amrein and Officer Glass went to Washington, D. C. They first went to the Police Headquarters. From there, accompanied by two Washington Detectives, they went to the Crestwood Apartments, 3900 16th Street, N.W., Washington, D. C. There, they first talked with the Manager and then went to Apartment 429 (65-66, 189-190). The door to the apartment was opened by a Mr. Rosenthal. After talking with him for a few minutes, they went to apartment 424, in which apartment the telephone Randolph 4037 had been installed, according to the records of the Telephone Company (66-67, 173, 189-190). They entered that apartment and observed that the telephone had been removed (67). They returned to the hall and again talked with Mr. Rosenthal. As a result of that conversation, they went to apartment 430 (directly across the hall from apartment 429). They rapped on the door, received no reply and found that it was locked. As a result of further conversation with Mr. Rosenthal, they sent for the Manager. She came upstairs and, in the presence of Rosenthal, unlocked apartment 430 (68, 190-191). In the bathroom of that apartment they found Petitioner (68, 191). The three apartments, to which reference has just been made, and apartment 426 had been rented by Mr. Rosenthal in the name of a Senator Madragal, a Philipino (165-166).

Upon entering the apartment, Lt. Amrein asked Petitioner what he was doing there. His reply was: "I came in here to rest." The ensuing conversation, as related by the Lieutenant (69), was as follows:

> "* * * I said, 'How did you get in here?' He said, 'Some man gave me a key.' I said, 'Who gave you the key?' He said, 'I don't know him.' 'Some man; what does he look like?' 'I don't know, he just gave me the key to come in here.' I said, 'Why do you come in here to rest, there is no bed in here, there is only chairs?' He said, 'I come in here to rest.' I said, 'Do you know this gentleman here, Mr. Rosenthal?' 'No, sir.' I said, 'Do you know Mr. McGuire, Mr. Rosenthal?' 'No, sir, never saw him before.'
>
> "I then said to McGuire, 'Do they call you Mack?' 'Well', he says, 'some people might.' 'Well', I said, 'they do call you Mack, don't they? Your name is McGuire, they give you that name of "Mack"?' He said, 'Some people might.' "

This conversation is confirmed by Officer Glass (191). Miss McDowell, Manager of the apartment house, did not know McGuire. She had never seen him before (164).

The Lieutenant then observed lottery paraphernalia on a table in the room (69). That consisted of 341 lottery slips (71, 72). Those slips showed "the amounts of money played on various numbers, lottery numbers; they showed the name or code name or number of the player, they showed the number of the original and carbon copies in red ink and they showed the amount, total amount of money on the bottom of the paper" (73). These lottery slips covered 13,500 three digit numbers and an aggregate play of $6,477.22 (74). Also on the table were tally sheets which contained "the names of various people who called in numbers to this telephone number in the Crestwood Apartments, and the amount of money is alongside each name, as to the amount

that was played, and that total is $9,719.75" (76). The name of Hess appeared on one of those sheets and alongside it the figure 800 (77). In addition to those just referred to, additional items of gambling paraphernalia, usually used by lottery syndicates, were seized by the police (79, 80, 84-91).

Lt. Amrein examined all of this paraphernalia in the presence of Petitioner. He asked Petitioner: "Whose writing is that on there, whose figures are they?" Petitioner's reply was: "Well, they are mine" (69, 191-192). At no time was it denied that the handwriting on the lottery slips and tally sheets was that of Petitioner.

Lt. Amrein told McGuire that "He could either go with the Washington authorities or he could come to Baltimore with us * * *" (110). That statement was made in the presence of Mrs. McDowell, manager of the Crestwood Apartments (110). Although available, she wasn't called by the defense. Petitioner did not answer immediately. In a moment he asked permission to speak to Mr. Rosenthal and, being granted permission to do so, went to apartment 429 where he talked with that gentleman. In a few minutes, he came back and told the Lieutenant and Officer Glass that he would accompany them to Baltimore (96, 110). Petitioner had his car at the apartment house and asked the police if he could drive to his home and let his wife know where he was going. Lt. Amrein rode in Petitioner's automobile. They were followed by Officer Glass in the Baltimore City police car (96, 111). At Petitioner's home, in Takoma Park, Montgomery County, Maryland, all three went into the house while Petitioner talked to his wife. They then entered the Baltimore City Police car and drove to police headquarters in Baltimore City (97, 112-113). Petitioner was not placed under arrest until after he had made the statement, to which reference is hereinafter made, at police headquarters in Baltimore (103, 113).

Petitioner testified on the limited question of police activities prior to his statements, to which Lt. Amrein and Officer Glass testified. He stated that he was advised by Lt. Amrein that he could either remain in Washington and be charged with robbery or burglary, or he could go to Baltimore (123); that at no time was he out of the presence of a police officer from the moment when they entered apartment 430 until after he had made his statement at police headquarters in Baltimore (124-126).

During the ride from the Crestwood Apartments to Petitioner's home in Takoma Park, he and Lt. Amrein engaged in conversation which, as related by Lt. Amrein, was as follows (64):

> "I asked Mr. McGuire, whether they didn't call him 'Mack', and he said yes. I then told him and showed him the various figures that we had heard and asked him whether or not Hess didn't call those numbers in to him, or if that wasn't he that Hess called the numbers in to; that is the way I put my question. He said, 'Yes, I remember that, Hess called them in to me.' I then asked him how long he had known Hess, and he said he had known him for a short time, that he had visited him in his store in Baltimore. I then asked him who he worked for. 'Well', he says, 'I don't know'. Well, I said, 'Who — let's put it that way — who pays you?' He says, 'I don't know.' I said, 'Well, you don't back these numbers yourself, do you?' He said, 'No, how can I back them?' I said, 'Well, doesn't Rosenthal pay you?' He said, 'Yes.' I said, 'How much does he give you?' He says '$120 a week.' I said, 'Well, doesn't Ben Rosenthal rent the apartments where you were picked up?' And he said, 'Yes. Well, he told you he did. You saw his father's picture in the cupboard, naturally he rents it; he told you he rented it.' I asked him whether he was the figure man for this syndicate.
>
> "(The Court) What does that mean?

"(The Witness) Well, the man that takes care of the figures, the brains, the man that is good at calculating figures, adding up, and whatnot. And he said, 'Yes, I take care of the figures.' I said, 'How did you happen to get into that?' He said, 'Well, I did the same thing in Milwaukee, and things got bad down there and I came up here.' I said, 'Did Rosenthal bring you up here?' He said, 'No, I came up here on my own.' I said, 'Well, let me ask you this, Mack: Do you work for Rosenthal or do you work for Senator Madragal, the room, that the apartment is listed to?' 'No', he said, 'I don't work for Madragal.' I said, 'Well, now, the telephone is listed in the name of Benjamin Cassell', and he laughed; he said, 'I never saw him, I don't know him, I never saw Cassell'. Well, that is about — we may have talked about other things."

After Lt. Amrein, Officer Glass and Petitioner arrived at police headquarters in Baltimore, Petitioner made the statement which is set forth in full in Petitioner's Appendix at pages 130-142. In that statement, Petitioner admitted that he was a gambler (130); that he knew Morty Hess (131); that it was "possible" that he had a conversation with Morty Hess regarding lottery bets but that he didn't recall it (131); that the figures on the lottery sheets were his (134).

ARGUMENT

I.

Did the Admission in Evidence, Without the Permission of the Sender, of the Substance of Telephone Conversations Obtained by Baltimore Police Officers by Means of Wiretapping Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

Petitioner's first contention is that the Trial Court erred in admitting in evidence the content of telephone conversa-

tions, to which Petitioner was a party, intercepted by the police by means of wiretapping; that such action by the Trial Court not only was contrary to the provisions of the Federal Communications Act of 1934 (47 U. S. C. A., Section 605) but also deprived Petitioner of his rights under the Constitution of the United States and the amendments thereto.

However, this question has been determined adversely to Petitioner not only in several decisions of the Court of Appeals of Maryland, but, in a very recent decision, by the Supreme Court of the United States. Neither the Federal Communications Act nor the Constitution of the United States prohibits the use in State court proceedings of evidence obtained and sought to be divulged in violation of said Act. *Hitzelberger v. State*, 174 Md. 152, 165-169; *Rowan v. State*, 175 Md. 547, 559-560; *Leon, et al. v. State*, 180 Md. 279, 283-285 (*certiorari denied* 316 U. S. 680, 86 L. Ed. 1753); *Bratburd v. State*, ... Md. ...., 88 A. (2d) 446, 449 (*certiorari denied* December 22, 1952, not yet reported); *Schwartz v. Texas*, No. 41, October Term, 1952, Supreme Court of the United States (not yet reported).

II.

Did the Admission in Evidence of the Lottery Paraphernalia Seized in an Apartment in Washington, District of Columbia, Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

Next, Petitioner claims that the Trial Court erred in admitting in evidence, over his objection, the lottery paraphernalia seized by the Baltimore City Police (and members of the Police Department of the District of Columbia) in the Crestwood Apartments, 3900 16th Street, N.W., Washington, D.C., on June 25, 1951. The basis of this claim

is the contention that such evidence was obtained by means of an unlawful search and seizure and contrary to the provisions of the Fourth Amendment to the Constitution of the United States.

First, as the present proceedings arose in a State court, Petitioner cannot be heard to complain that he has been deprived of his rights under the Fourth Amendment to the Constitution of the United States. *Wolf v. Colorado,* 338 U. S. 25, 93 L. Ed. 1782; *Schwartz v. Texas, supra.*

Second, under the law of Maryland, Petitioner has no standing to object to the admissibility of such evidence. According to his own testimony, he was merely an interloper in the apartment. The evidence clearly showed that the apartment had been leased by Mr. Rosenthal in the name of Senator Madragal and that Petitioner had gone there merely "to rest" (69).

In answer to this contention, the Court of Appeals of Maryland said (92 A. (2d) (Adv. Shts.) 584-585):

> "The appellant next contends that the evidence obtained in number 430 of the Crestwood Apartments was inadmissible under the Bouse Act, which makes inadmissible, in prosecutions for misdemeanors of the type in question, evidence 'procured by, through or in consequence of any illegal search or seizure'. If the incident had taken place in Maryland, it seems clear that the evidence would have been admissible on several grounds. While the police had no search warrant they were admitted to apartment number 430 by the manager for the landlord in the presence of, and with the tacit consent of, the lessee or his agent, Rosenthal. Kershaw v. State, Md., 85 A. 2d 783, 785. It is also clear that under the Maryland authorities that McGuire, as a mere interloper or at best a guest, claiming no interest in the premises, would have no standing to object to the entry. Saunders v. State, Md., 87 A. 2d

618, 620 and cases cited. Upon entry, the gambling paraphernalia were in plain view and no search was necessary. McGuire admitted that the entries were in his handwriting. Had the incident occurred in Maryland, the officers would have been justified in arresting McGuire and seizing the evidence of a crime committed in their presence.

"It is contended, however, that the legality of the seizure depends upon the law of the place where made, rather than the law of the forum. If we assume, without deciding, that the Bouse Act is broad enough to cover seizures made outside the State, and that the principle stated is applicable, we do not find that the law of the District of Columbia is materially different from the law of Maryland as applied to the facts in the instant case. See Shore v. United States, 60 App. D. C. 137, 49 F. 2d 519, certiorari denied 283 U. S. 865, 51 S. Ct. 656, 75 L. Ed. 1469, cited in Saunders v. State, supra and Gibson v. United States, 80 U. S. App. D. C. 81, 149 F. 2d 381, certiorari denied, O'Kelley v. United States, 326 U. S. 724, 66 S. Ct. 29, 90 L. Ed. 429. We do not understand that the principles that an entry by consent freely given is not illegal, and that an interest in the premises greater than that of a guest is prerequisite to a valid objection, are shaken by McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191, 93 L. Ed. 153, or United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93. * * *"

See also *Baum v. State*, 163 Md. 153, 156-157; *Frankel v. State*, 178 Md. 553, 562; *Bevans v. State*, 180 Md. 443, 448; *Resnick v. State*, 183 Md. 15, 18; *Lambert v. State*, ... Md. ..., 75 A. (2d) 327, 329-330; *Curreri v. State*, ... Md. ..., 85 A. (2d) 454, 455.

III.

Did the Admission in Evidence of the Confessions, Statements or Admissions Made by Petitioner While in the Custody of the Police Deprive Petitioner of His Rights Under the Constitution of the United States and the Amendments Thereto?

Finally, Petitioner claims that the confessions, statements or admissions made by him while in the custody of the police officers should not have been admitted in evidence by the Trial Court for the reason that such "confessions, statements or admissions" were obtained in violation of Petitioner's constitutional privileges.

None of the statements made by Petitioner to the police mounted up to confessions. At most, they were admissions by the accused, which are subject to different rules of evidence than confessions. *Delnegro v. State,* .... Md. ...., 81 A. (2d) 241, 245.

Neither of the authorities cited by Petitioner in support of this contention even approaches the factual situation presented here. In *Rochin v. California,* 342 U. S. 165, 96 L. Ed. (Adv. Shts.) 154, evidence of a violation of the narcotic laws had been obtained by the police by use of a stomach pump against the will of the accused. In *Williams v. United States,* 341 U. S. 97, 95 L. Ed. 774, a confession had been obtained from the accused by a private detective by the use of "a rubber hose, a pistol, a blunt instrument, a sash cord and other implements" — characterized by the Supreme Court of the United States as "brutal methods". In each of these cases, the Supreme Court of the United States held that the methods used deprived the accused of due process of law. Clearly, no such contention can be made in the present case.

CONCLUSION

It is respectfully submitted that there no merit to any of the contentions raised by Petitioner i his Petition and Brief, that there is no Federal question esented for consideration, and that, therefore, the Pition should be denied.

Respectfully submitted,

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